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IN THE UNITED STATES COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 175

PETSONELLA MORAGNE, ETC.,

PETITIONER,

vs.

STATES MARINE LINES, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals
For the Fifth Circuit

APPENDIX

(Title omitted in printing)

(Filed: April 27, 1965)

COMPLAINT

The plaintiff, PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually, by and through her undersigned attorneys, files this her complaint in the above styled cause and alleges:

COUNT I

1. The plaintiff, PETSONELLA MORAGNE, is the duly qualified administratrix and personal representative of the Estate of EDWARD MORAGNE, SR., deceased, by virtue of appointment by the Honorable Harry G. McDonald, County Judge of Hillsborough County, Florida, on February 19, 1965.

2. At the time of the death of EDWARD MORAGNE, SR., the said PETSONELLA MORAGNE was the lawful wife of said deceased.

3. That this action is brought for the benefit of the said widow and the following named minor children who were born as a result of the marriage of plaintiff and deceased: Ellen Gail Moragne, aged 11 years, and Artest Frankie Moragne, aged 10 years.

4. That at all times hereinafter mentioned the defendant was and is a corporation organized and existing under and by virtue of the laws of a State other than the State of Florida, to wit, the State of New York, but said defendant was and is engaged in doing business in Tampa, Hillsborough County, Florida, and at all times hereafter mentioned defendant owned and operated the vessel SS PALMETTO STATE, which said vessel was at all times hereafter mentioned engaged in navigation and engaged in the carriage of cargo for hire on the high seas and in navigable waters of the United States.

5. That at all times hereafter mentioned, the deceased was employed as a longshoreman by Gulf Florida Terminal Company, a stevedore of Tampa, Florida, and was performing his regular duties as a longshoreman loading and unloading cargo aboard the vessel SS PALMETTO STATE, owned and operated by the defendant.

6. That on or about December 31, 1964, the deceased as a longshoreman, was lawfully on or about the said vessel SS PALMETTO STATE owned and operated by the defendant, performing his regular duties as a longshoreman when, as a proximate result of the wrongful act, negligence, carelessness and default of the defendant, a hatch beam in one of the vessel's cargo holds fell onto and against the deceased causing his death on December 31, 1964.

7. That said hatch beam fell onto and against the deceased at the time and place aforesaid because the defendant, STATES MARINE LINES, INC., by and through its owners, officers, agents, servants and employees did by its wrongful act, negligence, carelessness and default, carelessly or negligently fail to keep and maintain said vessel SS PALMETTO STATE, its equipment and appurtenances in a safe, sound and proper condition, free from hazards and fit for use by the deceased and other persons lawfully using the same in the following particulars:

(a) Defendant failed to inspect, find and discover all defects, improper and faulty construction and dangerous conditions in and upon said vessel, remedy or correct same, or warn, notify or inform the decedent of same, or did carelessly or negligently fail to provide adequate safeguards or methods for preventing grievous injury or loss of life to persons, including the decedent, who would be lawfully on or upon said vessel.

(b) Defendant failed to provide proper and adequate locking devices on the hatch beam which caused the death of the deceased.

(c) Defendant failed to keep the locking devices on the hatch beam, which caused the death of the deceased, in proper working order.

(d) Defendant failed to inspect and discover the fact that the locking devices on the said hatch beam were worn and did not function properly.

(e) Defendant failed to warn plaintiff's decedent or his employer of the improper and unsafe condition of the locking devices on said hatch beam.

8. As a proximate result of the foregoing acts of negligence on the part of the defendant, the deceased lost his life

and the said widow has lost and will be deprived of the support deceased would have given her during his natural life; and the said children have lost and been deprived of the support deceased would have given them during their minority; and the widow has lost and been deprived of the help of deceased in the rearing and guidance of said children; and the said children have lost the companionship, protection and society of their father during their minority; and said widow has incurred ambulance, hospital and funeral expenses.

COUNT II

9. Plaintiff reavers and realleges each and every allegation contained in paragraphs 1, 2, 3, 4, 5 and 6 of Count I of this complaint.

10. That the said hatch beam fell upon and killed the deceased at the time and place mentioned above because the SS PALMETTO STATE was unseaworthy in the following particulars:

(a) The locks on the said hatch beam were improperly manufactured or installed.

(b) The locks on said hatch beam were improperly maintained.

(c) The locks on said hatch beam were loose and worn and failed to function properly.

(d) The locks on said hatch beam were not locked at the time of the accident alleged herein.

(e) The said hatch beam became loose from the hatch combing which was its proper place and fell to the deck of the hold striking the plaintiff's decedent.

11. As a proximate result of the unseaworthiness of the SS PALMETTO STATE as aforesaid, the decedent lost his life and the said widow has lost and will be deprived of the

support deceased would have given her during his natural life; and the said children have lost and been deprived of the support deceased would have given them during their minority; and the widow has lost and been deprived of the help of deceased in the rearing and guidance of said children; and said children have lost the companionship, protection and society of their father during their minority; and the said widow has incurred ambulance, hospital and funeral expenses.

COUNT III

12. Plaintiff reavers and realleges each and every allegation contained in paragraphs 1, 2, 3, 4, 5, 6 and 7 of Count I of the complaint.

13. As a proximate result of the foregoing acts of negligence on the part of defendant, plaintiff's decedent suffered severe and excruciating mental and physical pain and anguish prior to his death.

COUNT IV

14. Plaintiff reavers and realleges each and every allegation contained in paragraphs 9 and 10 of Count II of the complaint.

15. As a proximate result of the unseaworthiness of the SS PALMETTO STATE, plaintiff's decedent suffered severe and excruciating mental and physical pain and anguish prior to his death.

WHEREFORE, the said plaintiff claims damages from the defendant on each count in an amount in excess of One Thousand ($1,000) Dollars and respectfully requests a trial by jury of all the issues in this cause.

(Signature omitted in printing)

(Title omitted in printing)

(Filed: July 19, 1966)

PETITION FOR REMOVAL

The petition of States Marine Lines, Inc., defendant in the above-styled case, represents to the Court:

1. This civil action was brought and is now pending in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

2. This action was commenced in said Circuit Court on June 28, 1966, by the filing of a complaint, a true copy of which is attached hereto, marked Exhibit A, and by reference made a part hereof.

3. Summons Ad Respondendum was issued from said Circuit Court to the defendant States Marine Lines, Inc., and thereafter on the 29th day of June, 1966, served on defendant States Marine Lines, Inc., a true copy of said Summons Ad Respondendum with the Sheriff's Return of Service thereon is attached hereto, marked Exhibit B, and by reference made a part hereof.

4. Said Complaint is the initial pleading setting forth the claim upon which the action is based and defendant first received a copy of said initial pleading in the aforesaid manner on said 29th day of June, 1966.

No other process, pleadings, or orders have been served by or upon defendant in the said action.

5. Said action is a civil action of which this Court has original jurisdiction under 28 USC § 1332 and is one that the defendant is entitled to remove to this Court pursuant to 28 USC § 1441 in that the matter in controversy exceeds the sum of $10,000.00 exclusive of interest and costs, the action is between citizens of different states and at the time of the

commencement of this action and at all times since defendant States Marine Lines, Inc., has been and still is, a corporation organized and existing under the laws of the state of Delaware which has its principal place of business in New York and plaintiff Petsonella Moragne has been and still is a citizen of the State of Florida. The defendant was not at the time of institution of said action, and is not now, a Florida corporation, nor is it a corporation having its principal place of business in Florida.

6. Defendant files herewith a bond with good and sufficient surety as the statute in such cases provides, conditioned as the law directs, that the defendant will pay all costs and disbursements incurred by reason of this removal proceeding, should it be determined that this case was not removable or was improperly removed.

7. Written notice of the filing of this Petition for Removal and Bond has been given to all parties herein, and a copy of this petition has been, this date, filed with the Clerk of the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida.

WHEREFORE, defendant prays that the above action now pending against it in the Circuit Court in and for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, No. 48282-L, hereby be removed from said State Court to this Court.

DATED July 19, 1966.

(Signature, verification, exhibits and certificate of service omitted in printing)

(Title omitted in printing)

(Filed: July 20, 1966)

THIRD PARTY COMPLAINT

The Third Party Complaint of States Marine Lines, Inc., Defendant and Third Party Plaintiff, against Gulf Florida Terminal Company, Third Party Defendant, respectfully alleges upon information and belief as follows:

1. Plaintiff PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually, has filed against Defendant, States Marine Lines, Inc., a Complaint, a copy of which is hereto attached as Exhibit A.

2. Defendant and Third Party Plaintiff has procured the removal of the Plaintiff's Complaint and the law suit of which it was the initial pleading to this Court.

3. At all material times Defendant and Third Party Plaintiff was a corporation organized and existing under and by virtue of the laws of the State of Delaware and had its principal place of business in New York.

4. At all material times the Plaintiff was, and is, a citizen and resident of Hillsborough County, Florida.

5. At all material times Third Party Defendant, Gulf Florida Terminal Company, was, and is, a corporation organized and existing under the laws of the State of Florida with its principal place of business in Tampa, Florida.

6. At all material times Defendant and Third Party Plaintiff owned and operated the SS PALMETTO STATES.

7. The matter in controversy herein exceeds the sum of $10,000.00, exclusive of interest and costs.

8. At all material times, and prior to the happening of the matters alleged in the Complaint, Gulf Florida Terminal

Company had undertaken, for an agreed consideration, pursuant to a written contract with Defendant and Third Party Plaintiff, to perform in a workmanlike and safe manner certain stevedoring services on the SS PALMETTO STATE, at Tampa, Florida. The written contract just mentioned is attached hereto as Exhibit B and by specific reference made a part hereof.

9. When the SS PALMETTO STATE arrived at Tampa, Florida, on or about December 31, 1964, and prior to the accident alleged in the Complaint, Defendant and Third Party Plaintiff, through its officers and agents, delivered to Third Party Defendant, Gulf Florida Terminal Company, the custody and control of the main deck area, cargo spaces and cargo gear of said vessel, including the hatch or hold of the vessel in which Plaintiff's decedent was allegedly working at the time of the accident described in the Complaint. At the time of said delivery, the said main deck area, cargo spaces and cargo gear were clean, dry and in all respects seaworthy, safe and suitable for the working of cargo. Thereupon Gulf Florida Terminal Company undertook to perform the stevedoring services required.

10. Gulf Florida Terminal Company's agents and employees including Plaintiff's decedent, were on board the SS PALMETTO STATE to perform said stevedoring services pursuant to the contract aforementioned.

11. The stevedoring services and the stevedoring operations on board SS PALMETTO STATE on December 31, 1964, were under the exclusive control of Gulf Florida Terminal Company, its agents and employees.

12. If, at some time between the time Defendant and Third Party Plaintiff turned the vessel over the Third Party Defendant, and the time Plaintiff's decedent was injured, any condition arose to create a dangerous or unsafe working

condition or unsafe place to work, or if Plaintiff's decedent employed an unsafe manner of working, or if Plaintiff's decedent's fellow employees employed an unsafe manner of working, it was the duty of Third Party Defendant Gulf Florida Terminal Company to discover the unsafe or dangerous situation, condition or manner of working, and either to correct it or cause it to be corrected, or to halt work until the said condition, situation, or manner of working had been corrected, or do some or all of these things.

13. If Plaintiff's decedent was injured as alleged in the Complaint, and if Plaintiff's decedent, and Plaintiff, and the Parties on whose behalf it is alleged the Complaint was filed, suffered the injuries and damages alleged in the Complaint, all of which are denied, and if as a result of such alleged injuries and damages Defendant and Third Party Plaintiff is found liable to the Plaintiff, which liability Defendant and Third Party Plaintiff hereby denies, then any and all such liability was proximately caused by and proximately resulted from the fault or negligence of Gulf Florida Terminal Company, its agents or employees, in the following particulars, or some or all of them:

(a) In breaching its warranty of workmanlike service.

(b) In failing to properly supervise Plaintiff's decedent in his work.

(c) In failing to properly supervise Plaintiff's decedent's fellow employees in their work.

(d) In failing to conduct the necessary inspections of the vessel and its hatch covers, beams and cargo gear.

(e) In the negligent use of the equipment of the vessel provided to Gulf Florida Terminal Company for the discharging of the cargo of the vessel.

(f) In failing to furnish the requisite supervision of the discharge operation as a whole.

(g) In failing to bring to the attention of the vessel's personnel any condition requiring correction as to the hatches, holds, or cargo gear of the vessel, or the area in which Plaintiff's decedent was working.

(h) In failing to correct any defective condition with respect to the vessel's cargo gear, hatches, or holds, or area on the vessel in which Plaintiff's decedent was working.

(i) In failing to halt work in the area in which Plaintiff's decedent worked until any necessary corrections in the conditions of the vessel, its cargo gear, or work spaces had been made.

(j) In failing to perform the obligations resting upon it under the law, or under the contract for stevedoring services described above.

By reason whereof, Gulf Florida Terminal Company should idemnify Defendant and Third Party Plaintiff for any and all damages, costs, expenses and attorney's fees, Defendant and Third Party Plaintiff may be required to pay to the Plaintiff, or others, on account of or in consequence of the matters alleged in the Complaint.

14. Defendant and Third Party Plaintiff has been compelled to retain the law firm of Fowler, White, Gillen, Humkey & Trenam to defend it in this suit and is obligated to pay to said law firm its reasonable fees for services in this suit.

15. Defendant and Third Party Plaintiff is filing herewith its answer to the Complaint herein.

16. If the SS PALMETTO STATE was unseaworthy, as is alleged in the Complaint herein, which unseaworthiness is denied, then said unseaworthiness was brought into play by the fault or neglect of Third Party Defendant Gulf Florida Terminal Company, its agents or employees, in one or more of the particulars set out in Paragraph 13 above.

WHEREFORE, Defendant and Third Party Plaintiff States Marine Lines demands judgment against Third Party Defendant Gulf Florida Terminal Company for all sums that may be adjudged against said Defendant and Third Party Plaintiff States Marine Lines, Inc., in favor of the Plaintiff Petsonella Moragne, as personal representative of the Estate of Edward Moragne, Sr., deceased, and Petsonella Moragne, individually, together with costs, attorneys fees and expenses, or in the alternative, for all such sums as may reasonably be paid to the said Plaintiff in settlement of this matter, together with costs, attorneys fees and expenses, should the Plaintiff's claim be settled.

(Signature, exhibits and certificate of service omitted in printing)

(Title omitted in printing)

(Filed: Sept. 6, 1966)

MOTION TO STRIKE COUNT II OF THE COMPLAINT

Third Party Defendant, GULF FLORIDA TERMINAL COMPANY, by and through its undersigned attorney, moves the Court to strike Count II of Plaintiff's Complaint on the ground that unseaworthiness as a basis of liability is not encompassed within the provisions of the statutory right of action for death under Florida law, §768.01, Florida Statutes.

WHEREFORE, Third Party Defendant prays that the Court enters its Order striking said Count from the Complaint.

(Signature and certificate of service omitted in printing)

(Title omitted in printing)

(Filed: Sept. 21, 1966)

ORDER DISMISSING WITH PREJUDICE COUNT II OF PLAINTIFF'S COMPLAINT

This cause came on for hearing upon the Second and Third Defenses contained in the Answer of the defendant, STATES MARINE LINES, INC., to Count II of the plaintiff's complaint. These defenses are in the nature of motions to dismiss in that they challenge Count II as failing to state a claim upon which relief can be granted.

In Count II plaintiff seeks damages for the wrongful death of a longshoreman killed in Florida waters aboard the defendant's vessel. The plaintiff's claim in Count II is grounded upon the Florida Wrongful Death Act, §768.01 Florida Statutes, 1963, and seeks to recover upon the theory of unseaworthiness. The defendant relies upon the prior holdings of the United States Court of Appeals for the Fifth Circuit in *Graham v. A. Luci, Ltd.*, 206 F. 2d 233 (5th Cir. 1953), and *Emerson v. Holloway Concrete Products Co.*, 282 F. 2d 271 (5th Cir. 1960) and says the Florida Wrongful Death Statute does not give rise to an action for death caused by unseaworthiness, and is not entitled to proceed on the theory of unseaworthiness and, therefore, that so much of Count II as states a claim based on unseaworthiness must be dismissed.

Plaintiff contends that the Florida Wrongful Death Act does encompass the substantive law of the Admiralty and cites a Florida Circuit Court decision *Lee v. Gulf Coast Transit Company*, 24 Florida Supplement 31 (1961). Plaintiff also relies on *M/V Tungus v. Skovgaard*, 358 U.S. 588, 79 S. Ct. 503, 1959 A.M.C. 813 (U.S. 1959); *Holley v. The Manfred Stansfield*, 269 F. 2d 317, 1959 A.M.C. 2189 (4th Cir. 1959); *Maryland ex rel Gladden v. Weyerhaeuser*

Steamship Co., 176 F. Supp. 664 (D.C. Md. 1959); *Maryland ex rel Smith v. A/S Nabella*, 176 F. Supp. 668 (D. C. Md. 1959); *Halecki v. United New York and New Jersey Sandy Hook Pilots Association*, 358 U.S. 613, 79 St. Ct. 517 (U.S. 1958); *Hess v. U.S.A.*, 361 U.S. 314, 80 S.Ct. 341, 4 L. Ed. 2d 305 (U.S. 1960); *Anthony v. International Paper Co.*, 289 F. 2d 574 (4th Cir. 1961); *Union Carbide Corp. v. Goett*, 278 F. 2d 319 (4th Cir. 1960); *Cunningham v. Rederiet Vindeggen A/S*, 333 F. 2d 308 (2nd Cir. 1964).

We hold, in view of the controlling decisions of the United States Court of Appeals for the Fifth Circuit in *Graham v. A. Luci, Ltd.*, supra, and *Emerson v. Holloway Concrete Products Co.*, supra, that the plaintiff is not entitled to proceed on the theory of unseaworthiness and that so much of the plaintiff's second count as states a claim based upon unseaworthiness must be dismissed and plaintiff relegated to her claim for damages for wrongful death based upon negligence.

It is, however, the opinion of this Court that this Order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of this litigation. It is, therefore:

ORDERED:

1. That Count II of plaintiff's complaint is hereby dismissed with prejudice, and

2. That it is the opinion of this Court that this Order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from this Order my materially advance the ultimate termination of this litigation.

DONE AND ORDERED at Tampa, Florida, this 21st day of September, 1966.

s/ Joseph P. Lieb
UNITED STATES DISTRICT JUDGE

(Title omitted in printing)

On Application for Interlocutory Appeal

Before RIVES, GEWIN and GODBOLD, Circuit Judges.

BY THE COURT:

Leave to appeal from the interlocutory order of the United States District Court for the Middle District of Florida entered September 21, 1966, in its Civil Action No. 66-258-CIV-T be, and the same is hereby GRANTED.

(ORIGINAL FILED — OCTOBER 28, 1966)

(Seal)
A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By s/ Eugenia S. McMurphy
Deputy
New Orleans, Louisiana
OCT 28 1966

(Title omitted in printing)

(Filed: Nov. 10, 1966)

NOTICE OF APPEAL

NOTICE is hereby given that plaintiff, PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order of this Court entered on September 21, 1966, dismissing with prejudice Count Two of Plaintiff's Complaint.

(Signature and certificate of service omitted)

(Title omitted in printing)

(Filed: March 9, 1967)

PORTION OF APPELLANT'S ORIGINAL BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Page 4)

POINT ON APPEAL

THE FLORIDA WRONGFUL DEATH ACT ENCOMPASSES THE SUBSTANTIVE LAW OF THE ADMIRALTY AND PERMITS THE RECOVERY OF DAMAGES FOR DEATH OF A LONGSHOREMAN KILLED IN NAVIGABLE WATERS OF THE STATE OF FLORIDA CAUSED BY THE UNSEAWORTHINESS OF A VESSEL.

ARGUMENT

The sole issue before this Court is an interpretation of the Florida Wrongful Death Act, F.S. 768.01 * * *

(Title omitted in printing)

(Filed: October 30, 1967)

PORTION OF APPELLANT'S REPLY BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Page 3)

(A) THE CHOICE OF LAW MANDATE FROM THE HARRISBURG TO THE TUNGUS:

We readily agree with the Appellee that the Federal Courts must take the State Law as they find it, including its limitations. This is precisely the point the Appellant has been arguing. The State Law obviously *does* incorporate this action. The Statute was intended to incorporate this action, and this Court should be bound by the State Law. * * *

(Title omitted in printing)

(Filed: April 28, 1967)

SUGGESTION FOR CERTIFICATION OF CONTROLLING QUESTION OF STATE LAW TO THE SUPREME COURT OF FLORIDA

Come now the Appellees, STATES MARINE LINES, INC., and GULF FLORIDA TERMINAL COMPANY, by and through their undersigned attorneys, and file this their Suggestion For Certification Of Controlling Question

Of State Law To The Supreme Court Of Florida, and state as follows:

1. The parties are agreed, and the briefs filed herein show, that the sole question presented by this appeal must be decided solely in accordance with Florida law. See, *The "Tungus"* v. *Skovgaard*, 358 U.S. 588, 3 L. Ed.2d 524, 79 S. Ct. 503 (1959). More specifically, the sole question presented by this appeal requires judicial construction and interpretation of the Florida Wrongful Death Act, Florida Statutes, §768.01.

2. The parties are agreed, and the briefs filed herein show, that there is no controlling Florida appellate decision deciding the specific question presented by this appeal.

3. In somewhat similar circumstances the United States Supreme Court in *The "Tungus"* v. *Skovgaard*, 358 U.S. 588, 3 L. Ed.2d 524, 79 S. Ct. 503 (1959), recommended the use of any available procedures by which a definitive decision from the state court might be obtained on the critical question involved. Thus, Justice Frankfurter said in his concurring opinion (3 L. Ed.2d at 531):

> ". . . [A]uthoritative construction should be sought under readily available state procedures, from the state court, while the case is held in the federal court."

State procedures are available under Florida law for obtaining an authoritative decision from the Florida Supreme Court in this case. See, Florida Statutes, §25.031; Rule 4.61, Florida Appellate Rules: *Green* v. *American Tobacco Company*, 154 So.2d (Fla. 1963).

WHEREFORE, the appellees respectfully suggest and request that this court enter its appropriate certificate certifying to the Supreme Court of Florida the following question:

"WHETHER THE FLORIDA WRONGFUL DEATH ACT, FLORIDA STATUTES, §§ 768.01-768-02, PERMITS A SUIT THEREUNDER BASED UPON ALLEGATIONS OF "UNSEAWORTHINESS" AS THE DOCTRINE OF UNSEAWORTHINESS IS KNOWN IN FEDERAL MARITIME LAW."

(Signature and certificate of service omitted in printing)

(Title omitted in printing)

(Filed: June 6, 1967)

SUGGESTION OF PENDENCY IN THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA OF THE CASE OF EDNA WEED vs. OWEN BILBREY, SR., ET AL, CASE NO. 7204, WHICH HAS AT ISSUE THE CONTROLLING POINT OF LAW OF THE CASE HEREIN IN DISPUTE BEFORE THE FIFTH CIRCUIT COURT OF APPEALS

Comes now the appellant, PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., and PETSONELLA MORAGNE, individually, and suggests to this Court as follows:

1. There is now pending before the Second District Court of Appeal of the State of Florida the case of Edna Weed, Appellant, vs. Owen Bilbrey, Sr., et al, Case No. 7204, which has at issue:

> "Whether the trial court erred in holding that the absolute defense of contributory negligence — rather than the partial admiralty defense of comparative negligence — was applicable in an action for wrongful death brought under the Florida

Wrongful Death Statute, where the suit was predicated upon a maritime tort commited on navigable waters within the State of Florida. (Raised by Assignments of Error 1-3, 5-8, 11; R. 228-229)."

The appellant is advised that oral argument has been held on that case and the written opinion of the Second District Court of Appeal of Florida is expected in the very near future.

2. The issue to be decided by the Second District Court of Appeal of Florida will be the first ruling on this point by an appellate court of the State of Florida.

3. That under the rule of *Erie Railroad Co. v. Tompkins*, 58 S. Ct. 817, 304 U.S. 64, 82 L. ed. 1188 (1938), the decision of the Second District Court of Appeal of Florida will be binding upon the Fifth Circuit Court of Appeals.

4. That appellant, therefore, respectfully suggests to this Court that all further proceedings on Case No. 24198, Petsonella Moragne, as personal representative of the Estate of Edward Moragne, Sr., deceased, and Petsonella Moragne, individually, vs. States Marine Lines, Inc., vs. Gulf Florida Terminal Company, should be withheld pending the outcome of the aforesaid case in the Second District Court of Appeal of Florida.

5. The appellant further suggests that because of the pendency of the Weed case in the Second District Court of Appeal of Florida that it would be unnecessary and inappropriate for this Court to certify the issues in this case to the Supreme Court of the State of Florida.

(Signature and certificate of service omitted in printing)

(Title omitted in printing)

(Filed: July 6, 1967)

Appeal from the United States District Court for the Middle District of Florida

Before BROWN, GOLDBERG and AINSWORTH, Circuit Judges.

BY THE COURT:

On consideration of the suggestions filed by appellees for certification by this Court of an alleged controlling question of State Law involved on this appeal to the Supreme Court of Florida,

and of the further suggestion of pendency by appellants that this Court should instead stay all further proceedings on this appeal pending the decision of the case of *Edna Weed vs. Owen Bilbrey, Sr., et al,* Case No. 7204 on the docket of the Second District Court of Appeals for the State of Florida,

IT IS ORDERED that Appellants' request for stay is denied as such since the case is taken off of the calendar under the certification to the Supreme Court of Florida; but the Appellees' suggestion for certification to the Supreme Court of Florida is granted.

It is further ORDERED that counsel are directed to collaborate in the preparation of an adequate petition complying with the rules of the Supreme Court of Florida since the question in the bare form quoted in the Appellees' motion is inadequate. See Hopkins v. Lockheed Aircraft, 5 Cir., 1966, 358 F.2d 347; see also The Life Insurance Company of Virginia v. Shifflet, 5 Cir., 1966, 359 F.2d 501, and the recent opinion of the Supreme Court of Florida, May 31, 1967, in that case No. 36160 (opinion May 31, 1967) which quotes in full the certificate as previously issued by this Court. The

Court expects counsel to be able to prepare a mutually satisfactory certificate, but in the event this proves to be impossible the papers should be submitted jointly showing the extent to which counsel are in agreement and furnishing the exact wording of the proposed portions as to which disagreement exists. A written memorandum may be filed in support of the views of any such differences. The certificate may be filed in typewritten form (original and 7 clear copies) and this should be done within 30 days after the receipt of a copy of this order.

(Title omitted in printing)

(Filed: Aug. 11, 1967)

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF FLORIDA PURSUANT TO §25.031 FLORIDA STATUTES 1965 AND RULE 4.61 FLORIDA APPELLATE RULES

TO THE SUPREME COURT OF FLORIDA AND TO THE HONORABLE JUSTICES THEREOF:

It appears to the United States Court of Appeals for the Fifth Circuit that there are involved in the above styled case in said Court questions or propositions of the laws of the State of Florida which are determinative of the said cause, and that there are no clear, controlling precedents in the decisions of the Supreme Court of the State of Florida. The said United States Court of Appeals for the Fifth Circuit therefore certifies such questions or propositions of State law, pursuant to §25.031 Florida Statutes, 1965, and Rule 4.61, Florida Appellate Rules, as follows:

(1) STYLE OF THE CASE:

The style of the case in which this Certificate is made is as follows:

Petsonella Moragne, as personal representative of the Estate of Edward Moragne, Sr., Deceased and Petsonella Moragne, individually, appellant, versus States Marine Lines, Inc., a corporation, Appellee, versus Gulf Florida Terminal Company, a corporation, Appellee, Case Number 24198, United States Court of Appeals for the Fifth Circuit, said case being an interlocutory appeal from the United States District Court for the Middle District of Florida, Tampa Division.

(2) STATEMENT OF FACTS:

Plaintiff's decedent, a longshoreman, was killed on December 31, 1964, when a hatch beam on the vessel PALMETTO STATE became disengaged from its position, allegedly because of a defective locking arrangement, and fell into the hold striking the deceased in the head, killing him almost instantly.

Suit was filed in the Circuit Court of Hillsborough County, Florida, by Petsonella Moragne, individually, and as personal representative of the estate of Edward Moragne, Sr., against the vessel owners, States Marine Lines, Inc., under the Florida Death by Wrongful Act Statute, Florida Statutes, §768.01 et seq. and under the Florida Survival Act, Florida Statutes, §45.11. The defendant, States Marine Lines, Inc., removed the action to the United States District Court in and for the Middle District of Florida, Tampa Division, on the basis of diversity of citizenship. A motion to remand the action to the State Court was subsequently denied.

In her suit, plaintiff alleged in one count a cause of action for unseaworthiness under the Florida Death by Wrongful Act Statute. The District Court, pursuant to mo-

tion by the defendant, dismissed this count on the ground that the Florida Death by Wrongful Act Statute does not give rise to an action for wrongful death caused by unseaworthiness.

Appellant petitioned for leave to appeal this Interlocutory Order of Dismissal. The leave to appeal was granted pursuant to 28 U.S.C. 1292, by Order of this Court, Misc. No. 577, filed October 28, 1966.

The appellees herein filed a Suggestion For Certification Of Controlling Question Of State Law To The Supreme Court. This Suggestion was granted by Order of this Court dated July 8, 1967. The controlling question of Florida law certified hereby has been fully briefed by the parties in briefs styled in this Court which briefs accompany this Certificate. The parties are agreed that these briefs may be presented for consideration by the Supreme Court of Florida as if filed in that Court initially. The parties are agreed that no further briefs need be filed in the Supreme Court of Florida except as that Court may order, and excepting a reply brief which may be filed by the appellant if it so desires.

In substance, the appellant contends on this appeal that the Florida Death by Wrongful Act Statute incorporated the maritime doctrine of unseaworthiness and permits an action under such doctrine. Illustrative authorities relied upon by appellant are:

1. *M. V. Tungus* v. *Skovgaard*, 358 U. S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524, 1959 A.M.C. 813 (1959).

2. *Curry* v. *Fred Olsen Lines*, 367 F. 2d 921 (9th Cir. 1966).

3. *Grigsby* v. *Coastal Marine Lines*, 235 F. Supp. 97 (WD La. 1964).

4. *Byrd* v. *Napoleon Avenue Ferry*, D.C. 125 F. Supp. 573.

5. *Maryland ex rel Smith* v. *A/S Nabella*, 176 F. Supp. 668 (DC Md. 1959).

6. *Maryland ex rel Gladden* v. *Weyerhauser S.S. Co.*, 176 F. Supp. 664 (DC Md. 1959).

7. *Metzger* v. *S.S. Kirsten Torm*, 245 F. Supp. 227 (DC Md. 1956).

8. *United New York & New Jersey Sandy Hook Pilots Association* v. *Halecki*, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959).

9. *Petition of Mariana Mercante Nicaraguense, S.D.*, 248 F. Supp. 15 (SD NY 1965).

10. *Cunningham* v. *Rederiet Vindeggen, A/S*, 333 F. 2d 308 (2d Cir. 1964).

11. *Clark* v. *Iceland S.S. Co.*, 6 A.D. 2d 544, 179 N.Y.S. 2d 708, (1st Dept. 1958).

12. *Olsen* v. *New York Central Railroad Co.*, 341 F. 2d 233 (2d Cir. 1965).

13. *Hess* v. *United States*, 361 U.S. 314, 80 S. Ct. 341, 4 L. Ed. 2d 305 (1960).

14. *Compania Transatlantica Espanola, S.A.* v. *Melendez Torres*, 358 F. 2d 209, (1st Cir. 1966).

15. *Anthony, Adm.* v. *International Paper Co.*, 289 F.2d 574 (4th Cir. 1961).

16. *Holley* v. *The Manfred Stansfield*, 269 F. 2d 317 (4th Cir. 1959).

17. *Union Carbide Corp.* v. *Goett*, 278 F. 2d 319 (4th Cir. 1960), cert. den. 364 U.S. 824, 81 S. Ct. 64, 5 L. Ed. 2d 55.

18. *Chermesino* v. *Vessel Judith Lee Rose*, 211 F. Supp. 36 (DC Mass. 1962), affm'd. 317 F.2d 927, (1st Cir. 1963), cert. den. 375 U.S. 931, 84 S. Ct. 33, 11 L. Ed. 2d 264.

The appellees contend that the Florida Death by Wrongful Act Statute is based upon concept of fault, creates a new cause of action and does not preserve the rights of the decedent. Illustrative authorities relied upon by appellees are:

1. *Emerson* v. *Holloway Concrete Products Co.*, 282 F.2d 271 (C.A. 5, 1960), cert. den., 364 U.S. 941, 81 S. Ct. 459 (1961).

2. *Florida East Coast Ry. Co.* v. *McRoberts*, 149 So. 631 (Fla. 1933).

3. *Graham* v. *A. Lusi, Ltd.*, 206 F.2d 223 (C.A. 5, 1953).

4. *Gregory* v. *Paducah Midstream Service*, 401 S.W.2d 40, 1966 A.M.C. 2008 (Ky. App. 1966).

5. *Lee* v. *Pure Oil Co.*, 218 F.2d 711 (C.A. 6, 1955).

6. *Niepert* v. *Cleveland Electric Illuminating Co.*, 241 F.2d 916 (C.A. 6, 1957), cert. den., 354 U.S. 909, 77 S. Ct. 1295 (1957).

7. *Parker* v. *City of Jacksonville*, 82 So.2d 131 (Fla. 1955).

8. *Shiver* v. *Sessions*, 80 So.2d 905 (Fla. 1955).

(3) STIPULATED QUESTION OF LAW TO BE ANSWERED:

Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the maritime law of unseaworthiness for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?

The entire record in this case, together with copies of the briefs of the parties in this Court are transmitted herewith.

s/ John R. Brown
UNITED STATES CIRCUIT JUDGE
Presiding

(Filed: May 29, 1968)

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A. D. 1968

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,	**	
Appellants,	**	CASE NO. 36,601
vs.	**	
STATE MARINE LINES, INC., et al.,	**	
Appellees.	**	

Opinion filed May 29, 1968

Certified Question from the United States Court of Appeals for the Fifth Circuit

C. J. Hardee, Jr. of Hardee, Ott & Hamilton, for Appellants

John W. Boult, Dewey R. Villareal, Jr. and Fowler, White, Collins, Gillen, Humkey & Trenam for State Marine Lines, Inc.; David C. G. Kerr, Daniel E. Gallagher and Macfarlane, Ferguson, Allison & Kelly for Gulf Florida Terminal Company, Appellees

ROBERTS, J.

This cause is before the court for determination of a question of law certified to us by the United States Court of Appeals for the Fifth Circuit pursuant to §25.031, Fla. Stat., and Rule 4.61, Florida Appellate Rules, 31 F.S.A. Moragne v. State Marine Lines, Inc., et al., opinion and certificate filed August 11, 1967. The question certified reads as follows:—

> "Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the maritime law of unseaworthiness for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?"

Plaintiff-appellant's decedent was employed as a longshoreman by Gulf Florida Terminal Company, a stevedore of Tampa, Florida. While performing his regular duties as an employee of this company on board the vessel S. S. Palmetto State, a hatch beam became disengaged from its position, allegedly because of a defective locking arrangement, and fell into the hold striking the deceased in the head, killing him instantly.

Suit was filed by his widow, individually, under the Florida Wrongful Death Act, §768.01, Fla. Stat., and as personal representative of her deceased husband's estate, under the Florida Survival Statute, §45.11, Fla. Stat., against the defendant-appellee State Marine Lines, Inc., owner of the vessel S. S. Palmetto State, seeking the damages recoverable under these statutes by those entitled thereto. Originally filed in the appropriate state court, the cause was on motion of the defendant removed to the federal court on diversity-of-citizenship grounds.

The plaintiff's complaint was framed in two aspects: one based on the alleged negligence of the defendant-ship-

owner in failing to keep and maintain the vessel, its equipment and appurtenances, in a safe, sound and proper condition; and another based on the maritime concept of "unseaworthiness." The trial judge dismissed the unseaworthiness count as to the cause of action brought by the plaintiff, individually, under the Florida Wrongful Death Act for the reason that such a cause of action was not within the contemplation of the Wrongful Death Act. Leave to appeal this interlocutory order was granted by the Circuit Court of Appeals, and the question of law above was thereafter certified to this court for decision.

As we understand it, "unseaworthiness" as a basis for liability under maritime law has to do with the absolute nondelegable duty of a shipowner to provide members of the vessel's crew, including longshoremen when engaged in loading, unloading, or stowing the cargo, with a vessel "sufficient in all respects for the trade in which it is employed," Lowe v. Vessel Madrid, D. C. Fla. 1962, 210 Supp. 826, and to prevent their injury by any part of the vessel or equipment used in the ordinary course of their employment. Clark v. Symonette Shipyard Ltd., 330 F. 2d 554 (C.A. Fla. 1964). It contemplates "liability without fault", Mahnich v. Southern S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. ed. 561 (1944), and has been said to be "a duty likened to implied contractual warranty." Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872, 90 L. ed. 1099.

It is conceded that, had he lived, the plaintiff's decedent could have filed against the defendant-shipowner, in Admiralty, on a cause of action based on unseaworthiness. But this cause of action died with his death under maritime law. Neither the maritime law nor the common law recognized a cause of action for wrongful death. By statute, Congress has provided a remedy for wrongful death on the high seas (the Death on the High Seas Act, enacted in 1920,

46 U.S.C. Sec. 761), and for the death of a seaman (the Jones Act, 46 U.S.C. Sec. 688). But the death of the plaintiff, a non-seaman within the territorial waters of the State of Florida, is not covered by either of these federal statutes. (We note, parenthetically, that even under the Jones Act the plaintiff could not have recovered for the wrongful death of her husband under her cause of action based on unseaworthiness. See Gillespie, Admx. v. United States Steel Corp. 379 U.S. 148, 13 L.Ed. 2d 199 (1964), re-affirming Lindgren v. U. S., 281 U.S. 38, 74 L. ed. 686, decided in 1930.)

It appears that the plaintiff, as the widow of the decedent, is entitled to the benefits prescribed by the Federal Longshoremen's and Harbor Workers' Compensation Act, Title 33, U.S. C.A., Chapter 18, for the death of her husband; however, any additional remedy to that provided by the federal compensation act must be found, if at all, under the Florida Wrongful Death Act, §768.01, Fla. Stat.

This Act, §768.01, provides as follows:

> "(1) Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness, or default, of any agent of any corporation, acting in his capacity of agent of such corporation (or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon), and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action (or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of

her) and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation (or the ship, vessel or boat), which would have been liable in damages if death had not ensued shall be liable to an action for damages (or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam), notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

"(2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto."

Since its enactment in 1833, this Act has been treated as restricted in its application to deaths resulting from tortious acts for which the actor would have been liable to the deceased under traditional common-law concepts. See Shiver v. Sessions, 80 So. 2d 905 (Fla. 1955), and Shearn v. Orlando Funeral Home, 88 So. 2d 591 (Fla. 1956).

It is equally well settled that the Florida Act does not preserve the right of action which the deceased, had he lived, could have prosecuted, but creates in behalf of the statutory beneficiaries a totally new right of action for the wrongful death, on different principles. See Florida East Coast Railway Co. v. McRoberts, 149 So. 631 (Fla. 1933); Shiver v. Sessions, supra, 80 So. 2d 905; Parker v. City of Jacksonville, 82 So. 2d 131 (Fla. 1955). In the Florida East Coast Railway case the plaintiff sought to recover in a wrongful death action the punitive damages which the decedent, had he lived, could have claimed. In holding that they could not be recovered, this court said:—

"The common-law right to recover punitive dam-

> ages having accrued as an incident to the right of the injured party to recover from the tortious injury inflicted in this case, the death of such injured party caused both the right of action and the incidents to it to die at the same time."

It was also pointed out that the language of our Wrongful Death Act, requiring the jury to give such damages "as the party or parties entitled to sue may have sustained by reason of the death of the party killed", clearly implied that punitive damages were to be excluded from consideration in a wrongful death action.

Further illustrating the distinction between the two rights of action — that of the deceased, had he lived, and that of the statutory beneficiaries under the Wrongful Death Act — it was held in each of the other two cases cited above that the statutory beneficiaries could recover the damages sustained by them, even though their decedent's suit, had he lived, would have been barred. Shiver v. Sessions, supra, 80 So. 2d 905; Parker v. City of Jacksonville, supra, 82 So. 2d 131.

Because of its obligation, in enforcing a state-created right, to "take the right subject to the limitations which have been made a part of its existence . . .", The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.ed. 358 (1886), the Fifth Circuit Court of Appeals held in two cases in accordance with the decisions of this court, supra, that an action for wrongful death based on unseaworthiness was not within the contemplation of the Florida Wrongful Death Act. See Graham v. A. Luci, Ltd., 206 F. 2d 223, (C.A. 5, 1953), and Emerson v. Holloway Concrete Products, 282 F. 2d 271 (C.A. 5, 1960).

On the appeal in the instant case, and here, the appellant contends that amendments to the Florida Wrongful Death

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Act made in 1915 and in 1953 have changed its complexion: that, while originally creating and authorizing death actions only when based on a tort against the plaintiff's decedent, the Act has now been broadened to include causes of action arising *ex contractu* as well as *ex delicto*. The appellate court was urged to recede from its decisions in the Graham and Emerson cases, and this court is urged to reject those decisions and align itself with the "great weight of authority" in other jurisdictions and hold that a death action based on unseaworthiness is created by the Florida Wrongful Death Act.

The courts of other jurisdictions, in the decisions here relied on by appellant, appear to us to have made an entirely different interpretation of their wrongful death acts from that made by this court. For example, in Holley v. The Manfred Stansfield, 269 F. 2d 317 (C.A. 4th 1959), it was held that the Virginia statute was intended "to preserve rights which the decedent would have had if his injuries had not proved fatal." This interpretation is in direct conflict with the statement of this court concerning the Florida Act in Florida East Coast Railway Co. v. McRoberts, supra, 149 So. 631, that the provisions of the Act

> ". . . do not purport to transfer to the statutory representatives . . . the right of action which the injured party might have maintained for his injury had he lived, but those sections give to such statutory representatives . . . a totally new right of action for the wrongful death, and that on different principles."

Likewise, in Vassallo v. Nederl-Amerik etc., 344 S.W.2d 421 (Tex. App. 1961), in rejecting the construction of the Texas Wrongful Death Act made by the Fifth Circuit Court of Appeals in Tuelson v. Whitney and Bodden Shipping Co., 10 F.2d 412 (C.A. Tex. 1926), as to the applicability in a death action of the comparative negligence rule authorized in

Admiralty, it was said that under the Texas Wrongful Death Act

> ". . . the defendant can assert any defense to that cause of action that it could have asserted if the decedent had survived, and no other. The statutory beneficiaries of a deceased longshoreman have the same substantive rights to recover as the deceased would have had had his injury been less than death. It follows that this contributory negligence must be considered only in mitigation of damages."

This interpretation is contrary to the decisions of this court quoted above; since, as noted, in the Shiver and Parker cases, supra, 80 So.2d 905 and 82 So.2d 131, the defense asserted by the defendant in each of those cases would have been a bar to a suit by the decedent to recover for *his* injuries, but was disallowed in the suit filed by the statutory beneficiaries to recover for *their* injuries; and in the Florida East Coast Railway case, supra, 149 So. 631, it was held that a substantive right of recovery which the decedent would have had (to recover punitive damages) was extinguished with his death along with his right of action, and that, having once died, the express terms of the Act — requiring the jury to award such damages as the *statutory beneficiaries* may have sustained by reason of the death of their decedent — "affirmatively negatives the idea that punitive damages are to be considered as an incident to the damages allowed for the new statutory cause of action." 149 So. at p.636. And it would seem to be just as inconsistent with the express terms of the Act to allow the damages by the *statutory beneficiaries* by reason of the death of their decedent to be "mitigated" — that is, reduced — in such proportion as the negligence of their decedent contributed to *his* injuries and damage, as it would have been to award punitive damages to the statutory beneficiaries because of the injuries sustained by their decedent.

Yet this would be the result of the holding here contended for by appellant, since the maritime concept of "unseaworthiness" not only holds the ship-owner *liable without fault* but also allows the seaman or longshoreman to recover even though he is at fault — the so-called comparative negligence rule of the maritime law. As noted above, such a result would appear to be "affirmatively negatived" by our Wrongful Death Act, as in the Florida East Coast Railway case, supra, 149 So. at page 636.

We are not, therefore, persuaded by the decisions cited by the appellant, since they appear to be bottomed on statutes entirely different — or, at least, interpreted differently — from the Florida Wrongful Death Act. On the other hand, the appellee calls our attention to decisions based on death statutes interpreted as creating "a new right of action" and holding that the substantive law of the state, rather than concepts peculiar to maritime law such as "unseaworthiness" and the comparative negligence rule, was applicable in a wrongful death action. See Lee v. Pure Oil Co., 218 F.2d 711 (C.A. 6, 1955); Curtis v. Garcia y Cia, 241 F.2d 30 (C.A. 3, 1957); and Niepert v. Cleveland Electric Illuminating Co., 241 F.2d 916, (C.A. 6, 1957), cert. den. 354 U.S. 909, 77 S.Ct. 1295 (1957). These decisions are in accord with the interpretation of the Florida Wrongful Death Act made by this court in the decisions cited above, and many others.

Nor are we persuaded that the 1915 and 1953 amendments to the Florida Wrongful Death Act had the effect of *creating* a right of action for death caused by unseaworthiness, as contended by the appellant.

The 1915 amendatory Act, Ch. 6913, Laws of Florida, Acts of 1915, was entitled "AN ACT to amend Sec. 3145, General Statutes of the State of Florida, [Sec. 768.01(1), Fla. Stat.] relating to claims for death caused *by negligence*." (Emphasis added.) It added to the statute the clauses ap-

pearing in parentheses in the Act, Sec. 768.01(1), quoted above. The parentheses were a part of the Act, as amended. The purpose of the Legislature in parenthesizing these additions to the Act is not apparent; perhaps, it was simply to make clear that the Act contemplated a cause of action for death even though predicated on circumstances giving rise to a tort cognizable in Admiralty as well as under the substantive law of this state. In any event, we cannot assume that the Legislature intended, in 1915, to extend the Wrongful Death Act to include a right of action based on a concept purely maritime in character, unknown to the common law and the substantive law of this state, contrary to the decisions of this court interpreting the Act, and not within the intendment of the Act, as expressed in the title of the amendatory Act, as one creating a cause of action "for death caused *by negligence.*" If this had been intended, it would have been a simple matter to add appropriate words at the end of the list of derelictions recited in the Act, and to so indicate in the title of the amendatory Act. It did not do so, and still has not done so, unless that result was achieved by the 1953 amendment to the Act, as here contended by the appellant.

The 1953 amendment, Ch. 28280, Laws of Florida, Acts of 1953, added Subsection (2) of the Act, to provide that

> "(2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto."

It was adopted subsequent to the decision of this court in Whitley v. Webb City, Inc., 55 So.2d 730 (Fla. 1951), presumably to encompass a death action based on a cause of action for breach of implied warranty without fault recognized by this court in a limited area. See Sencer v. Carl's Market, Inc., 45 So.2d 671 (Fla. 1950); Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965), and cases cited therein. The appellant makes the ingenious argument that

a cause of action for "unseaworthiness" is a specie of "liability without fault", in the nature of an "implied contractual warranty", and, as such, is within the contemplation of the 1953 amendment, supra.

We think no useful purpose would be served in entering into a discussion of the "strict liability" theory under which this court has in a few situations — mostly involving foodstuffs — held a manufacturer or retailer to be strictly liable for injuries resulting from use of a product without regard to established common-law principles relating to implied warranty. It suffices to say that the maritime concept of "unseaworthiness" is completely foreign to the "implied warranty" concept of strict liability with which the Legislature was obviously concerned in enacting the 1953 amendment. Moreover, to hold that "unseaworthiness" is contemplated by the Act, as amended in 1953, we would have to assume that the Legislature intended to grant to one small segment of our population (the surviving dependents of a deceased longshoreman or seaman killed in the course of his employment) the special privileges which the maritime law would have accorded, not to *them*, but to their *decedent*, and to deny an equal advantage to others similarly situated in all respects except as to the occupation of their decedent. In the absence of a clear legislative mandate, we cannot infer such a discriminatory intention on the part of the Legislature, even if it be assumed, arguendo, that such an intention could be validly accomplished. Cf. Georgia Southern & Florida Railway Co. v. Seven-Up Bottling Co. of Southeast Georgia, 175 So.2d 39 (Fla. 1965).

Finally, we note that the Legislature lost no time in amending the Wrongful Death Act following the decision of this court in the Whitley case, supra, 55 So.2d 730 (it was amended at the next succeeding session of the Legislature), yet more than fifteen years have elapsed since the

Fifth Circuit Court of Appeals held the Graham case, supra, 206 F.2d 223, that the Act was not applicable to a death action based on the maritime tort of "unseaworthiness," and it has been more than eight years since this holding was reaffirmed in the Emerson case, supra, 282 F.2d 271. The Legislature has not seen fit to act in response to such decisions.

In all of these circumstances, it is our opinion that to hold that "unseaworthiness" is within the contemplation of our Wrongful Death Act would be tantamount to judicial legislation; and this, of course, is beyond our constitutional power.

The decision of a Florida District Court of Appeal in Weed v. Bilbrey, 201 So.2d 771, referred to by appellant, has been noted; however, this decision is pending before this court on direct-conflict certiorari and is not, therefore, either final, authoritative or decisive of the certified question.

For the reasons stated, the answer to the question certified must be in the negative.

CALDWELL, C. J. and THOMAS, J., concur
WHITE, Circuit Judge (Retired), concurs with Opinion
ERVIN, J., dissents with Opinion

WHITE, JOS. S., Circuit Judge, (Retired), concurring:

Liability for "unseaworthiness" as applied by the Federal Courts seems even broader than liability for breach of implied warranty. While the duty arising in case of unseaworthiness has been compared, by way of illustration, with the duty created by implied warranty, yet the Supreme Court of the United States, at the same time, has said: "It (liability for unseaworthiness) is essentially a species of liability without fault, analogous to other well known instances in our laws. Deriving from and shaped to meet the hazards which

performing the service imposes, the liability *is neither limited by conceptions of negligence nor contractual in character.*" See Seas Shipping Co. v. Sieracki, supra. (Emphasis added)

This concept takes the case beyond the purview of Florida's Wrongful Death Statute.

Hence, I concur in the opinion prepared by Mr. Justice Roberts.

ERVIN, J., dissenting:

I am unable to agree with the foregoing opinion insofar as it holds that Florida's Death by Wrongful Act statute (Section 768.01, F.S.) does not incorporate the general maritime law concept of "unseaworthiness" of a vessel.

I agree with the reasoning supplied by Judge Brown in his able dissent in Emerson v. Holloway Concrete Products Company (5thCir.1960), 282 F.2d 271, 285, to the effect that the specific reference to admiralty proceedings contained in the Florida statute reflects a commanding purpose to "extend to survivors whatever benefit the substantive maritime law would have afforded for maritime injuries."

Prior to 1953, I acknowledge that some doubt could have been raised in opposition to the view that Florida statute incorporated substantive maritime concepts; or at least some speculation could have been proffered as to the extent of any such incorporation. Thus, before 1953 the enumeration of the terms "wrongful act," "negligence," "carelessness," or "default" may have provided some support for the proposition that the statute only extended to embrace liability concepts sounding in the characteristics suggested by those specific terms; that is, liability predicated on duties responsive to the fault or negligence culpability of the defendant. Accordingly, until 1953 it might have been argued with some force

that the purposeful scope of the statute necessarily excluded the maritime doctrine of "unseaworthiness" and other principles which predicate liability on implied warranty theory or which are founded on expanding concepts of "strict liability." It is obvious, however, that whatever motion may have existed prior to 1953 concerning the limited nature of substantive concepts of liability under the statute [see Whitley v. Webb City, Inc. (Fla. 1951), 55 So.2d 730] such was clearly expunged by the amendment (Ch. 28,280) in 1953 by the Florida Legislature which provided for actions thereunder ex contractu or ex delicto. Under the amendatory clarification as to the intended scope of substantive liability embraced by the statute, this Court has incurred little difficulty in predicating wrongful death recovery on the theory of "implied warranty." See Green v. American Tobacco Co. (Fla. 1963), 154 So.2d 169. In light of these developments, it can no longer be logically asserted that our Wrongful Death Statute is strictly a "Lord Campbell's Act," and thereby exclusive of those substantive liability concepts foreign to the common law at the time of its enactment.

In Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, seaworthiness was said to be a "duty likened to implied contractual warranty." In Strike v. Netherlands Ministry of Traffic, 185 F.2d 555 (2dCir.1950), cert. den. 341 U.S. 904 (1950), it was defined as "a relationship giving rise to an implied warranty as between the owner and seaman." Viewed, therefore, in accordance with the crystallized scope of our statute pertaining to the substantive law on which recovery thereunder may be achieved, I am convinced that the statute contemplates the incorporation of the maritime concept of seaworthiness. See Weed v. Bilbrey (Fla.App.1967), 201 So.2d 771, holding that the statute embraces the maritime doctrine of comparative negligence. By holding otherwise, I feel the majority has unduly restricted the intent embraced by the 1953 amendment to the statute

and has placed in doubt, if not departed from, the existing law relating to recovery for death predicated on implied warranties of fitness and suitability or other strict liability concepts. See Toombs v. Ft. Pierce Gas Co. (Fla.1968), 208 So.2d 615, for example of the expanding development of nonmaritime liability concepts as potential grounds for predicating wrongful death benefits.

(Title omitted in printing)

(Filed: June 10, 1968)

PETITION FOR REHEARING

Appellant respectfully petitions the Supreme Court of Florida to grant a rehearing and to reconsider its opinion entered and filed in this cause for the reason that the Court majority overlooked or failed to consider the following:

1. The three decisions cited by the Court's majority as authority for the majority holding, i. e., *Lee v. Pure Oil Co.*, 218 F. 2d 711 (CA 6, 1955-Tenn. Statute); *Curtis v. Garcia y Cia*, 241 F. 2d 30 (CA 3, 1957-Pa. Statute); and *Niepert v. Cleveland Electric Illuminating Co.*, 241 F. 2d 916 (CA 6, 1957-Ohio Statute) were all decided before the decision of the Supreme Court in *The M/V Tungus v. Skovgaard*, 358 U.S. 588, 79 S. Ct. 503, 3E. ed. 2d 524 (1959) and every decision since The Tungus by the courts of a maritime state has been in accord with the decision in *The Tungus v. Skovgaard*, supra, and directly contrary to the holding of the majority in this case.

2. The holdings of the courts of every maritime state which has decided the question is in conflict with the majority decision of this Court, including Massachusetts, New York, New Jersey, Maryland, Virginia, South Carolina, Louisiana, Texas, California and Oregon. This decision of the Florida Supreme Court will make Florida the only major maritime

state denying to the dependents of dead longshoremen the benefits of the admiralty substantive law. (see enumeration of cases p. 14-18 of Appellant's original brief)

3. The Court majority, in holding strictly to common law principles, apparently overlooked the fact that the Florida Death by Wrongful Act statute is itself an abrogation of the common law, the 1953 amendment is an extension of the abrogation of the common law and that the statute is remedial in nature and, therefore, entitled to a liberal construction. *U. S. Fidelity & Guaranty Company v. Reed Construction Co.*, 149 So. 2d 578.

4. The holding of the majority cannot possibly be squared with the decision of this Court in *Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla. 1963). See also *Green v. American Tobacco Co.*, 391 F. 2d 97 (CA 5, 1968).

5. The Court overlooked the fact that just as strict liability has developed in consumer warranty cases because of the dangerous nature of the products handled, so the doctrine of strict liability has developed in warranty of seaworthiness cases because of the extremely dangerous nature of the work of seamen and longshoremen. This Court has traditionally recognized the need for liberal construction of the law where dangerous instrumentalities or products were concerned, i. e., automobiles, moving cranes, drugs, food stuffs, etc. The Court majority's apparent hostility to the doctrine of unseaworthiness runs diametrically opposite to the traditionally humane attitude of the Florida Supreme Court in like cases.

6. The majority of the Court overlooked the fact that the United States Supreme Court in *The Tungus v. Skovgaard*, supra, while unanimously concurring in the result in that case, divided 5 to 4 on the question as to whether the states should apply state law or state legal interpretation in cases affecting maritime rights. A four member minority of the Supreme Court, (Chief Justice Warren and Justices Brennan, Black and Douglas) felt, in the interest of uniformity, that where it

was once determined that a state wrongful death act furnished a remedy to the dependents of a longshoreman killed in the course of his employment, the admiralty substantive law should be uniformly applied so as to avoid the development of a situation where the dependents of longshoremen in some states were covered by the law and in other states not. A bare majority of five in the Supreme Court (Justices Frankfurter*, Clark*, Harlan, Whittaker* and Stewart) felt that the matter of such interpretation should be left to the states. The decision in this case lends emphasis to the fears expressed by the minority in *The Tungus v. Skovgaard*, supra. (*no longer on the court)

7. While it is true that this Court has many times said that the Florida Act creates a new right or a new and distinct cause for action, this Court has never until now in any case shut out from the benefits of the statute a class of persons who would have benefited through the decedent had he lived. The holding in this case is in no way similar or required by this Court's holdings in *Florida East Coast Railway Co. v. McRoberts*, 149 So. 631 (Fla. 1933); Shiver v. Sessions, 80 S. 2d 905 (Fla. 1955); and *Parker v. City of Jacksonville*, 82 S. 2d 131 (Fla. 1955).

8. The decision of the majority places Florida in direct conflict with the law in every other maritime state in the United States and deprives the dependents of longshoremen of an important right to which they would be entitled if they resided in any other maritime state in the United States. The decision turns Florida backward instead of forward in the area of maritime law. Such a decision can hardly contribute to the growth and progress of this state in a field of growing importance, i. e., maritime trade and commerce.

For the foregoing reasons, Appellant respectfully urges this Court to reconsider its opinion and decision entered and filed on May 29, 1968.

(Signature and certificate of service omitted in printing)

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A.D. 1968
WEDNESDAY, JULY 3, A.D. 1968

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,

Appellants

—vs

STATE MARINE LINES, INC., ET AL.,

Appellees

CASE NO. 36,601

On consideration of the Petition for Rehearing filed by Attorneys for Appellants,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,
TEST:
SID J. WHITE
Clerk Supreme Court

By ALLEN O'NEILL WILKINS
Chief Deputy Clerk

(I HAVE TODAY MAILED TO THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT OPINION OF MAY 29, 1968 IN THE ABOVE CAUSE)

(Title omitted in printing)

(Filed: Aug. 6, 1968)

MOTION FOR ORDER OF REVERSAL NOTWITHSTANDING THE OPINION OF THE FLORIDA SUPREME COURT

The Appellant respectfully requests an Order of Reversal, notwithstanding the opinion of the Florida Supreme Court in this cause and as grounds therefore would show:

1) The Florida Supreme Court's decision on the question certified by this Court is the first time since *Tungus v. Skovgaard*, 358 U. S. 588, 79 S. Ct. 503, 3 L. ed 2d 524, 1959 A.M.C. 813 (1959), that a State Court has interpreted its Wrongful Death Statute to preclude the remedy sought here.

2) To apply Florida State Law will destroy the uniformity of Maritime Law established since the *Tungus* case.

3) The cause of action the Appellant seeks to assert here is grounded on a Federal cause of action which requires uniformity in its application. To apply Florida State Law will destroy the uniformity so necessary to the judicial administration of Federal Maritime Law.

(Signature and certificate of service omitted in printing)

(Title, topical index, and index of citations omitted in printing)

(Filed: Nov. 1, 1968)

SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLANT'S MOTION FOR ORDER OF REVERSAL NOTWITHSTANDING THE OPINION OF THE FLORIDA SUPREME COURT

STATEMENT OF THE CASE

The history and statement of the case are found in Appellant's original brief.

The Court granted Appellant leave to file this Supplemental Brief in open court during the argument upon Appellant's Motion for Judgment of Reversal Notwithstanding the Opinion of the Florida Supreme Court held in New Orleans on October 28, 1968.

CONSTITUTIONAL PROBLEM

The position taken by the Supreme Court of Florida, in its opinion in answer to the question certified by this Court (i. e., that the Florida common law, rather than substantive admiralty law, applies to cases involving the wrongful death of maritime workers killed on navigable waters within the territorial limits of the State of Florida) contravenes and violates Article 3, Section 2, of the Constitution of the United States.

In *Knickerbocker Ice Co. v. Stewart*, (1920) 253 U.S. 149, 40 S. Ct. 438, 64 L. ed 834, the United States Supreme Court declared unconstitutional an attempt by the Congress to extend the operation of State workmen's compensation statutes to injuries and death occurring on navigable waters within the territorial limits of the States and said:

> "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect to them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such

law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Since the beginning federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states — not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago:

> 'That we have a maritime law of our own, operative throughout the United States, cannot be doubted * * * One thing, however is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' *The Lottawanna*, 21 Wall. 558, 574, 575 (22 L. Ed.

654). (P. 160-161)

* * *

> Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent." (p. 166)

The decision in *Knickerbocker Ice Co. v. Stewart*, supra, followed the Supreme Court decision in *Southern Pacific Company v. Jensen* (1917), 244 U.S. 205, 37 S. Ct. 524, 61 L. ed 1086, holding that the New York Workmen's Compensation Statute could not be validly or constitutionally applied to compensate for the death of a longshoreman killed on navigable waters in the State of New York. Subsequent to *Knickerbocker Ice Co. v. Stewart*, supra, the Congress again attempted to extend the State workmen's compensation laws to cover injuries or death of maritime workers occurring on navigable waters within the territorial limits of the States, but excluding masters and members of the crew of vessels. Again the Supreme Court, following *Knickerbocker Ice Co. v. Stewart*, supra, declared unconstitutional this Congressional enactment. *Washington v. W. C. Dawson & Co.* (1924) 264 U.S. 219, 44 S. Ct. 302, 68 L. ed 646.

In *Red Cross Line v. Atlantic Fruit Company*, (1924) 264 U.S. 109, 44 S. Ct. 274, 68 L. ed 582, the Supreme Court held that the State of New York had the authority to confer a remedy for the enforcement of arbitration contained in a maritime contract and distinguished between remedies, which States have the right to furnish, from the substantive law which the States do not have the authority to tamper with.

In this case the Supreme Court said:

> "The 'right of a common law remedy,' so saved to suitors, does not, as has beeen held in cases

which presently will be mentioned, include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. (p. 123-124)

* * *

This state statute is wholly unlike those which have recently been held invalid by this court. The Arbitration Law deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt to either modify the substantive maritime law or to deal with the remedy in courts of admiralty." (p. 124)

The Appellant contends that the State of Florida may provide a remedy for wrongful death occurring on navigable waters of the State provided such remedy is in addition to remedies provided under admiralty law and not in conflict therewith. *The Roanoke*, 189 U.S. 185, 23 S. Ct. 491, 47 L. ed 770; *Gillespie v. U. S. Steel Corp.*, (1964) 379 U.S. 148, 85 S. Ct. 308, 13 L. ed 2d 199.

The Appellant vigorously contends, however, that the State of Florida may not apply state or common law in determining the rights, obligations or liabilities of the parties in a case involving such a maritime death. Clearly, the duty to furnish a seaworthy ship exists whether or not a person is injured or death results from the violation of that duty. The duty is maritime in nature and does not fail to exist simply because a death occurs, granted that there may not be a remedy or a right to obtain damages for the breach of duty,

absent an appropriate State statute. In no event, however, can the Florida courts or legislature constitutionally extend the Florida common law to cover such maritime torts where the common law conflicts with admiralty law.

If the Florida Supreme Court or the Florida Legislature can constitutionally provide the substantive law applicable to marine deaths, then such state law becomes paramount and takes the place of admiralty substantive law.

Appellant contends that the State of Florida may not, either by its courts or legislature, provide the system of law which prevails and determine the rights, obligations and liabilities of the parties in a case involving a maritime death, except to the extent that it provides a remedy in addition to other remedies provided by admiralty law for the enforcement of duties founded in admiralty law.

In this case, the Florida Supreme Court has extinguished the doctrine of unseaworthiness on Florida waters in death cases. In *Bilbrey v. Weed*, So. 2d recently decided, that Court, following its opinion in this case, has substituted the absolute bar of contributory negligence for the admiralty principle of comparative negligence.

If Florida can do what is claimed here, is there anything to prohibit the legislature from passing nautical rules of the road, collision rules or other substantive principles which conflict with the traditional and ancient substantive law of admiralty, restricted, of course, to death cases, simply on the principle that where Florida furnishes the remedy it may also provide the substantive law?

PRESENT STATUS OF TUNGUS

Appellant also wishes to again call the Court's attention to the questionable present status of the rule announced in *M/V Tungus v. Skovgaard*, (1959) 358 U.S. 588, 79 S. Ct. 503, 3 L. ed. 2d 524. In *Tungus*, Chief Justice Warren and

Justices Black, Douglas and Brennan, felt that admiralty law must be applied uniformly and the State wrongful death statutes must be restricted to furnishing a remedy for wrongful death. That the States had no right to furnish the substantive law to go with the remedy, in conflict with admiralty law.

In *Goett v. Union Carbide Corporation*, (1960) 361 U.S. 340, 80 S. Ct. 357, 4 L. ed. 2d 341, and *Hess v. United States*, (1960) 361 U.S. 314, 80 S. Ct. 341, 4 L. ed. 2d 305, Justice Whitaker explained his position in *The Tungus* and in doing so apparently receded from the position of the majority therein:

> "I am persuaded that the Court of Appeals has made sufficiently clear that it thought this diversity, admiralty, death case was governed by the general maritime law, as remedially supplemented by the West Virginia Wrongful Death statute, and properly decided it on that basis.
>
> The Court's opinion says that The Tungus v. Skovgaard, 358 U.S. 588, 79 S. Ct. 503, 3 L. ed. 2d 524, 'decided that it was a question of state law as to what is the proper substantive law to be applied to maritime torts within the territorial jurisdiction of the States in wrongful death cases [and that] [u]nder this holding, in a maritime tort death case, the State might apply the substantive law generally applicable to wrongful death cases within its territory, or it might choose to incorporate the general maritime law's concepts of unseaworthiness or negligence.' I do not understand the Tungus case to so hold, and if such a holding was intended by its author or by any of the Justices who joined it, it does not say so.
> * * *

Although state Wrongful Death statutes are not ones of survivorship and are generally spoken of as creating a new cause of action for death, it seems rather clear that the West Virginia Wrongful Death statute, like most others, creates a cause of action only in the sense of providing a remedy for death resulting from an act made wrongful by other laws — whether common, statutory or maritime laws — which would have redressed the wrong 'if death had not ensued.' W. Va. Code, 1955, §5474(5). And when, in a case encompassed by the terms of the State's Wrongful Death statute, admiralty 'adopts' such statute, it does so only to afford a remedy for a substantive cause of action created by the maritime law which, 'if death had not ensued,' would have redressed it." (p. 345-346)

In *Hess v. U. S.*, supra, Justices Harlan and Frankfurter receded from their position in *The Tungus*, supra:

"The Court, if I read its opinion right, holds that when a victim of a maritime tort dies as a result of such conduct, the law of the State whose wrongful death statute is invoked wholly governs liability. At the same time the Court leaves open the question whether a state wrongful death act might contain 'provisions so offensive to traditional principles of maritime law that the admiralty would decline to enforce them,' finding that this Oregon statute 'presents no such problem.'

I cannot agree with the view that wrongful death actions growing out of maritime torts are so pervasively controlled by state law, or with the conclusion that this state statute in its substantive

provisions is, in any event, not offensive to maritime law." (p. 322-323)

In *Goett v. Union Carbide Corporation*, supra, the Chief Justice and Justices Black, Douglas and Brennan, noted that they joined with Justice Clark in this per curiam opinion solely under compulsion of *The Tungus* and noted their continuing disagreement with the ruling in *Tungus*. In the *Hess* case, the Chief Justice and Justices Black, Douglas and Brennan likewise joined with Justice Stewart in the majority opinion and noted their continuing disagreement with the decision in *Tungus*.

Appellant, therefore, urges that the majority in *Tungus* has been so dissipated in subsequent decisions that it can no longer serve (if, in fact, it ever did) as controlling authority for the proposition that the States have the paramount right to provide substantive law applicable under their respective wrongful death statutes.

CONCLUSION

It is apparent that there is present confusion regarding the meaning and thrust of the Supreme Court's decision in the *M/V Tungus v. Skovgaard*, supra.

It seems clear, however, that the power of the States is constitutionally limited by Article 3, Section 2 of the United States Constitution. The States may:

1. Provide a remedy for the enforcement of admiralty principles where: (a) no such remedy exists in admiralty law, or (b) the State remedy is in addition to and not in conflict with existing admiralty remedies;

2. The States may not provide a remedy in conflict with existing admiralty remedies; and

3. The States may not provide substantive law in the maritime field since only the Congress and the federal courts have jurisdiction to provide such substantive law.

Here, Florida has clearly provided a remedy for wrongful death where none exists in admiralty law. The remedy itself, that is, the right to recover damages for wrongful death on navigable waters, does not conflict with existing admiralty remedies.

Florida has attempted to go further and to substitute Florida substantive law for existing admiralty substantive law, fixing the rights, obligations and liabilities of the parties arising from death occurring on navigable waters.

This, Florida may not constitutionally do.

(Signature and certificate of service omitted in printing)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24198

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., Deceased and PETSONELLA MORAGNE, Individually,

Appellants,

versus

STATES MARINE LINES, INC., ET AL,

Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

(April 1, 1969)

Before WISDOM, THORNBERRY, and GOLDBERG, Circuit Judges.

PER CURIAM: On August 11, 1967, this Court entered its certificate certifying to the Supreme Court of Florida the following stipulated question:

> "Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the maritime law of unseaworthiness for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?"

The Supreme Court of Florida in *Moragne v. State Marine Lines*, 1968, ... Fla. ....., 211 So.2d 1961, in answer to the question, stated:

> "For the reasons stated, the answer to the question certified must be in the negative."

No useful purpose will be served by additional review of pertinent authority upon the issue of law presented in this appeal. It is sufficient to say that in *Tungus v. Skovgaard*, 1959, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524, the United States Supreme Court held that the question whether a State Wrongful Death Act encompasses a cause of action for unseaworthiness is a question to be decided by the courts of that state.

Since the Florida Supreme Court has determined that the Florida Wrongful Death Statute does not encompass a cause of action for unseaworthiness, the judgment is AFFIRMED.

United States Court of Appeals

For the Fifth Circuit

October Term, 1968

No. 24198

D. C. Docket No. CA 66-258-CIV-T

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., Deceased and PETSONELLA MORAGNE, Individually,

Appellants,

versus

STATES MARINE LINES, INC., ET AL,

Appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before WISDOM, THORNBERRY and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellants pay to appelles, the costs on appeal to be taxed by the Clerk of this Court.

April 1, 1969

Issued as Mandate: APR 23 1969

STIPULATION

Counsel for the respective parties stipulate that the above and foregoing shall constitute the single Appendix in this case.

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Gulf Florida Terminal Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing single Appendix have been furnished by hand delivery to each of the following: William A. Gillen, Esquire, of Fowler, White, Collins, Gillen, Humkey & Trenam, 220 Madison Avenue, Tampa, Florida, Counsel for the Respondent, States Marine Lines, Inc., and George W. Ericksen, Esquire, of Macfarlane, Ferguson, Allison & Kelly, 512 North Florida Avenue, Tampa, Florida, Counsel for the Respondent, Gulf Florida Terminal Company; and three true copies of same have been furnished by air mail to the following: The Honorable Erwin N. Griswold, Solicitor General, U. S. Department of Justice, Constitution Avenue and 10th Street, N. W., Washington, D. C. and the Clerk of the United States Court of Appeals for the Fifth Circuit, by mail this 24th day of December, 1969, in compliance with the Supreme Court Rules.

By.....

Attorney